# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 3 |
| The companies involved | 3 |
| The district court proceedings | 6 |
| The question is substantial | 8 |
| Conclusion | 25 |
| Appendix A | 1a |
| Appendix B | 16a |


## CITATIONS

Cases:


*Brown Shoe Co.* v. *United States*, 370 U.S. 294 2

*Federal Trade Commission* v. *Proctor & Gamble Co.*, No. 342, O.T. 1966, decided April 11, 1967 14, 19

*United States* v. *du Pont & Co.*, 366 U.S. 316 2, 8, 9, 10, 23, 24

*United States* v. *Kaiser Aluminum & Chemical Corp.*, Civil Action No. 2795, D. R.I., April 28, 1961 22, 23

*United States* v. *Kennecott Copper Corp.*, 231 F. Supp. 95, affirmed *per curiam*, 381 U.S. 414, subsequent opinion, 249 F. Supp. 154 4, 5, 12, 16

*United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 14, 19

*United States* v. *United States Gypsum Co.*, 340 U.S. 76 8

Statutes:


| | Page |
|---|---|
| Clayton Act, 38 Stat. 731, as amended: | |
| Section 7 (15 U.S.C. 18) | 2, 4, 6, 7, 8, 10, 12, 14, 16, 19, 20, 22, 25 |
| Section 15 (15 U.S.C. 25) | 2 |
| Section 2, Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29 | 2 |
| Miscellaneous: | |
| Adams & Dirlam, *Steel Imports and Vertical Oligopoly Power*, 54 Amer. Ec. Review 626 (1964) | 12 |

# In the Supreme Court of the United States

OCTOBER TERM, 1967

No. —

UNITED STATES OF AMERICA, APPELLANT

*v.*

ALUMINUM COMPANY OF AMERICA AND ROME CABLE CORPORATION

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK*

## JURISDICTIONAL STATEMENT

### OPINIONS BELOW

The opinions of the district court approving the plan of divestiture (App. A, *infra*, pp. [illegible]-15a) and establishing the terms of divestiture (App. B, *infra*, 16a–35a) are unreported. The opinion of the district court on the merits is reported at 214 F. Supp. 501, and this Court's opinion reversing that decision is reported at 377 U.S. 271.

### JURISDICTION

The judgment of the district court approving the plan of divestiture was entered on January 20, 1967, and notice of appeal was filed on March 20, 1967. By order dated May 18, 1967, the lower court extended the time for docketing the appeal in this Court to and including June 19, 1967. The jurisdiction of this

Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29; *Brown Shoe Co.* v. *United States*, 370 U.S. 294; *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316.

## QUESTION PRESENTED

In *United States* v. *Aluminum Co. of America*, 377 U.S. 271, this Court held that the 1959 acquisition by Alcoa of the Rome Cable Corporation violated Section 7 of the Clayton Act, and ordered divestiture. The question presented is whether the district court's decree of divestiture and its order approving the sale of Rome to the Okonite Company constituted appropriate and adequate relief.

## STATUTE INVOLVED

The relevant portions of the Clayton Act, 38 Stat. 731, as amended, provide as follows:

Section 7.

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly [15 U.S.C. 18].

Section 15.

> The several district courts of the United States are invested with jurisdiction to prevent

> and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case * * * [15 U.S.C. 25].

## STATEMENT

This is a direct appeal from a final judgment of the district court approving a plan of divestiture whereby Rome Cable Corporation ("Rome"), found by this Court to have been illegally acquired by the Aluminum Company of America ("Alcoa"), would be sold to the Okonite Company ("Okonite"), which, like Rome, is a non-integrated manufacturer of wire and cable products.

### THE COMPANIES INVOLVED

*Rome.* Rome is a producer of a wide range of wire and cable products. It is known for its substantial technical capabilities, as an aggressive and effective competitor (R. 666, 937, 1073)[1] and "had a broad line of high-quality copper wire and cable products in addition to its aluminum conductor business, a special aptitude and skill in installation, and an active and efficient research and sales organization." 377 U.S. at 281. Its annual sales for 1956 through 1965 ranged

[1] "R." refers to the printed record in the prior appeal to this Court, No. 204, 1963 Term.

between $33 million and $56 million (DXR 50).[2] Its 1966 sales were estimated during the proceedings on divestiture at $60 million, due to prevailing high prices and increased productivity (Tr. 207–09).[3] In 1960 it ranked at least eighth in sales in the wire and cable industry (DXR 56).[4]

*Okonite.* Okonite is an 83 percent-owned subsidiary of Ling-Temco-Vought, Inc. ("LTV").[5] LTV acquired it from the Kennecott Copper Corporation ("Kennecott") pursuant to a district court judgment of divestiture resulting from the ruling that Kennecott's prior acquisition of the then independent Okonite violated Section 7 of the Clayton Act. *United States* v. *Kennecott Copper Corp.*, 231 F. Supp. 95 (S.D.N.Y.), affirmed *per curiam*, 381 U.S. 414, subsequent opinion on relief, 249 F. Supp. 154 (S.D.N.Y.). Okonite is a non-integrated fabricator of wire and cable products. It is among the largest independent copper wire and cable producers, exercising leadership in research and engineering, enjoying a reputation for quality, and offering a broad line of wire and cable products (GX 800–804, 807; Tr. 58, 148, 347). Its ranking, assessed conservatively,

---

[2] "DXR" refers to the defendants' exhibits on relief.

[3] "Tr." refers to the transcript of proceedings held on November 2–4, 1966, relating to the proposed sale of Rome to Okonite.

[4] Rome's true position as a seller of wire and cable products was probably closer to fifth, because three of the companies listed in the cited exhibit—Western Electric (first), General Motors (fifth), and General Electric (seventh)—consume substantial portions of their own production.

[5] Except where otherwise indicated, the facts regarding LTV and Okonite are taken from the district court's opinion approving Alco's plan of disposal.

was ninth among wire and cable producers in 1960 (DXR 56).* Okonite distributes its products in a national market (GX 804, 809; Tr. 339) and continually reviews its product lines with a view toward meeting consumer demands as market changes occur (GX 803, Tr. 437). Okonite's sales for the year 1965 were approximately $68.5 million (GX 800).

The district court in the *Kennecott* case, *supra*, found that "Okonite was the country's second largest independent insulated wire and cable fabricator;" that

> [t]he Okonite management was young and progressive and was reputed to be one of the most able in the industry. As an independent, Okonite relied on research, leadership in engineering and a reputation for quality to help market its products and to earn premium prices where possible. It claimed to be a leader in its field in terms of know-how and production ability. Its product line was quite broad compared with other independent wire and cable companies [231 F. Supp. at 96, 97];

and that "Okonite manufactures a broad range of insulated copper wire and cable, as well as some bare wire." 249 F. Supp. at 159.

*LTV*. LTV, which recently acquired Okonite, is "concededly * * * a strong, well-managed diversified business corporation. It operates through four subsidiaries in the development and production of materials in the fields of aeronautics, electronics, missiles,

* If the self-supplying wire and cable producers are excluded, see note 4, *supra*, p. 4, Okonite would rank approximately sixth.

space and through Ohonite in wire and cable products * * *. It shows steadily increasing net assets which approximate 220 million dollars as of June 30, 1966. It also shows a substantial increase in sales and profits for the first nine months of 1966 as compared with the same period of 1965" (App. A, *infra*, p. 4a). Its dramatic expansion represents "one of the high growth situations in this country" and it has "made a smash success of Ohonite in the first nine months" (Tr. 58-59).

## THE DISTRICT COURT PROCEEDINGS

On April 1, 1960, the United States brought suit charging that the 1959 acquisition of Rome by Alcoa violated Section 7 of the Clayton Act. The district court dismissed the suit after trial, finding that competition had not been injured in the product markets that it determined to be the relevant lines of commerce. 214 F. Supp. 501. On appeal this Court reversed, holding that competition was substantially lessened in the aluminum conductor sub-market. 377 U.S. 271. The case was remanded to the district court "since there must be divestiture * * *." 377 U.S. at 281.

Following unsuccessful attempts by the parties to agree upon a judgment, the district court after evidentiary hearings entered a decree of divestiture on April 27, 1966. The decree, based largely upon a plan of relief proposed by Alcoa, required Alcoa to attempt for a period of six months to sell the Rome facilities; after that time the period could be extended, at the court's discretion, for another three months. If Alcoa

failed to find a purchaser within that time, it could apply to the court to authorize other relief; the judgment specifically included the alternatives that Alcoa (a) could be permitted to sell only the Rome assets employed in manufacturing the aluminum wire and cable products that overlap with Alcoa's products, or (b) could keep those assets but not use them for five years, or (c) could be relieved entirely of the obligation to sell. The price which Alcoa was permitted initially to establish as an approximate minimum for the sale, termed an "upset" price, was based on the value of Rome's land, plant and equipment as carried on Alcoa's books, plus raw materials, work in process, inventories, and the like, certain pension and termination pay plans, and incidental expenses relative to the sale. The sale was to be made to an "eligible purchaser," defined simply as "any person, firm, or corporation approved by the court" (App. B, *infra*, p. 29a).

The United States opposed the time limit and upset price provisions, arguing that they unduly restricted Alcoa's alternatives and incentives for achieving prompt and complete divestiture.

On October 17, 1966, Alcoa requested the court to approve a proposed sale of Rome to Okonite for approximately $31 million, the upset price as of August 31, 1966. The United States opposed the sale on two principal grounds: first, that the sale not only would fail to dissipate the anticompetitive effects of Alcoa's original Section 7 violation but, by merging two previously independent and substantial wire and cable fabricators, would present significant competitive problems of its own; and second, that there had been

no showing that Rome could not have been divested by less anticompetitive means, since the high "upset" price had discouraged other prospective purchasers. After an evidentiary hearing the court approved the sale on January 20, 1967. Rejecting the contention that the acquisition involved significant competitive problems, the court ruled that the existing competitive overlap between Rome and Okonite was "of de minimis proportion" (App. A, *infra*, p. 7a), and that Okonite and Rome were not "potential competitors" because "there is no evidence that in the foreseeable future either Rome or Okonite plans to or is capable of entering a product field other than it now occupies" (*id.*, p. 10a). The court indicated (*id.*, p. 11a; Tr. 36, 493) that Okonite's ability to provide funds for the operation of the Rome facilities and the salutary effect of such operation on the local economy of the Rome, New York, community were factors in its decision to approve the sale.

## THE QUESTION IS SUBSTANTIAL

This appeal presents substantial issues concerning the standards by which a district court is to determine the propriety of a proposed plan of relief from an acquisition that has been found to violate Section 7 of the Clayton Act. The "remedial phase [of an antitrust case], more often than not, is crucial. For the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it" (*United States* v. *duPont & Co.*, 366 U.S. 316, 323; see, also, *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 89). This Court has stated that "complete divestiture is peculiarly appro-

priate in cases of stock acquisitions which violate § 7" (*duPont, supra,* p. 328), and in the prior appeal in this case it held that "there must be divestiture" (377 U.S. at 281). We recognize at the outset that in the present case the sale to Okonite would constitute "complete divestiture" of Rome and thus in one sense would be "effective to redress the antitrust violation proved" (*duPont, supra,* p. 323), *i.e.,* that Alcoa's acquisition of Rome was "reasonably likely to produce a substantial lessening of competition within the meaning of § 7" in the relevant market of "aluminum wire and cable" (*United States* v. *Alcoa,* 377 U.S. 271, 273, 280).

In a more meaningful sense, however, such a sale would not effectively cure the basic vice of the Alcoa-Rome merger. The fundamental anticompetitive evil of the merger was in changing the structure of the market—already "highly concentrated" and "dominated by a few companies" (377 U.S. at 278–279)—by eliminating one of the few remaining independent significant competitive forces there (*id.* 280–281). In other words, the market tended to be substantially less competitive after the merger than it had been before; the purpose of relief, therefore, is to reestablish, to the maximum extent possible, the competitive situation that would have existed at the time of the relief proceeding if the merger had not taken place. This is, at best, a difficult task. Particularly in a case such as this, where considerable time has elapsed since the merger,[7] it may be impossible to determine, with any degree of accuracy, how the acquired firm would have

[7] Alcoa acquired Rome more than eight years ago, in March 1959 (R. 1284).

fered had there been no merger. In addition, the pre-merger competitive situation may have been further distorted by the advantages the acquiring firm obtained during the time the merger has been in effect. Thus, merely to undo the merger does not necessarily restore the prior competitive situation; the dynamics of economic change may make such restoration impossible. But this is all the more reason to be wary of making the sale of the illegally acquired company the occasion for sanctioning a merger of an actual and a potential competitor which also, in effect, furthers concentration.

Moreover, relief in a Section 7 case would not be "effective to redress the antitrust violation found" (*duPont, supra*) if, in the process of attempting to restore the competitive situation that the merger precluded, it created new significant competitive problems. Since such problems would arise as a result of efforts to undo the merger, they are directly attributable to it; and it is no less important to avoid new competitive restraints than it is to eliminate the old ones. In determining the significance of such problems, the government is not required to show that the disposition proposed would violate Section 7. *United States v. duPont, supra*, at pp. 331-332. Rather it need only appear that such relief leaves a substantial likelihood that competition in the industry remains significantly less than what it would have been but for the original violation. To be sure, it may not always be possible to avoid all new anticompetitive consequences [illegible] divestiture. But that is all the more reason why that district court should be held to a strict standard in determining whether a proposed plan of divestiture does create the probability of significant

new threats to competition and, if so, whether there is alternative relief that would be equally effective in undoing the merger while at the same time minimizing new anticompetitive effects. Similarly, the court should avoid any provisions in the decree that would make such anticompetitive effects more likely.

In approving the sale of Rome to Okonite the district court applied the wrong standards for determining whether the disposition would create significant anticompetitive problems. Had the court applied the proper standards, it should not have approved the sale on this record.[8] Moreover, two provisions of the district court's original decree—the high "upset" price set as an approximate initial minimum sales price, and the relatively short period during which Alcoa was required to attempt to find a purchaser—restricted the scope of the search for alternative purchasers of Rome and thereby decreased the likelihood that appropriate relief, raising no significant additional competitive problems, would be achieved.[9]

---

[8] We do not assert that a sale of Rome to Okonite would be improper under all conceivable circumstances. Our contention is rather that the district court applied an erroneous evaluation of the competitive problems presented by such sale, and that as a result of the provisions of the decree inimical to the fullest search for an appropriate purchaser, the district court could not determine whether more satisfactory alternatives were available.

[9] Although the government objected at the first hearing to relief in such provisions, it did not appeal therefrom at that time because review of the issue then would have been premature, since within the period Alcoa might have found a purchaser for Rome at the upset price which presented no significant competitive problems. The time to seek such review was when the district court approved a purchaser which the government disapproved.

We stress that our disagreement with the district court involves not merely the claim that it improperly exercised its discretion in approving the sale, but the broader point that it applied erroneous standards for deciding the adequacy of relief. This appeal, therefore, presents legal issues of continuing and substantial importance in the administration of Section 7 of the Clayton Act, which warrant plenary consideration by this Court.

1. In evaluating the propriety of the proposed disposition of Rome to Okonite, the district court failed to recognize, as an overriding consideration, that where two unlawful mergers have taken place in the same industry and where the courts in condemning the mergers have emphasized the competitive importance of independent companies (377 U.S. at 280–81; 231 F. Supp. at 105), the merger of the two acquired companies is not likely to be the best method for restoring the industry's competitive structure as it would have existed but for the illegal mergers.[19] Even more significantly, however, the court failed to recognize the importance of avoiding divestiture to a firm which would create additional competitive prob-

[19] The disposition of Rome to Okonite actually involves the combination of three once-separate companies, since the Okonite properties that Kennecott transferred to LTV included Kennecott's own, internally-developed wire and cable facilities. See 249 F. Supp. at 156; Oler Deposition, p. 148. As to the desirability of maintaining independent fabricators in an industry characterized by a high degree of vertical integration, see Adams & Dirlam, *Steel Imports and Vertical Oligopoly Power*, 54 Amer. Ec. Review 626, (1964). The authors there find the existence of independent steel fabricators to be a significant check on the pricing power of the integrated steel companies.

lems, and it applied erroneous standards for determining the existence of such problems. Had the court applied the proper criteria for ascertaining the existence of actual and potential competition between Rome and Okonite, it should not have approved the sale on this record.

a. The record shows that there is significant potential competition between Rome and Okonite in the aluminum conductor line of commerce. This Court, in reversing the district court's dismissal of the government's suit, found that aluminum conductor was an appropriate sub-market and that in that line of commerce, the merger of Alcoa and Rome substantially lessened competition. In the relief proceedings, however, the district court concluded that "since Okonite does not manufacture aluminum products of any kind, it would seem to necessarily follow that the anti-competitive effects fatal to the Rome-Alcoa merger will be entirely eliminated under the proposed plan" (App. A, *infra*, p. 6a). Relying on its evaluation of the stated intentions of company management with respect to future production, the court ruled that it

> has no basis to assume that the present policy of the governing body of either involved corporation will in the foreseeable future reverse its present policy of management so as to increase its product lines and thereby become actual competitors in the market place. The judgment of experienced businessmen is more reliable than speculation * * *. [App. A, *infra*, p. 10a]

The court further stated that Okonite's "prior unsuccessful efforts in the aluminum field may well have dampened its ardor" (App. A, *infra*, p. 9a), and that in the future only Kerite, and not Okonite, would be likely to produce aluminum conductor.

In so holding, the court failed to follow the standards announced by this Court for assessing, in the even stricter context of a Section 7 suit, the probability that a firm will enter a market in the future. The touchstone for assessing the likelihood of entry is not the intentions stated by company management during the course of litigation; it is rather the objective market factors that bear upon a firm's decision to enter a new line of endeavor. *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158; see *Federal Trade Commission* v. *Procter & Gamble Co.*, No. 342, O.T. 1966, decided April 11, 1967.

The record in this case shows that Okonite had the capability to produce aluminum wire and cable and that there were strong market pressures impelling it to do so. Okonite's Vice-President for Manufacturing stated without challenge that the "same machinery can be used to draw aluminum and copper. Some modifications have to be made in the lubricating system to do it but essentially the machines are similar" (Wagman Deposition, p. 72). It "is not a difficult problem" (*id.* at 73-75). He further stated that Okonite's insulating capability could be applied to a wide variety of products (*id.* at 30-36, 48, 66). As to Okonite's incentive to produce aluminum wire and cable, Okonite's Vice-President for Marketing testified that "because of the scarcity of copper * * * [the substi-

tution of aluminum is] the most significant trend today in the industry" (Oler Deposition, p. 182). Moreover, even as a matter of subjective corporate intention, the record shows that Okonite was interested in producing aluminum conductor. At the hearing on relief Okonite's President testified that "it is most likely that we will be forced to convert to aluminum conductor" in manufacturing certain underground wiring (Tr. 305). An internal LTV document indicates that LTV's interest in aluminum was so substantial as to have been a significant factor in its initial decision to purchase Rome: "LTV's need to develop aluminum conductor applications in light of the copper supply problem can most efficiently be accomplished through Co. 'B' [Rome] rather than reinstituting aluminum capability at Okonite" (GX 801(B)).

Thus, Okonite had substantial reasons for producing aluminum conductor, the manufacturing capability for doing so, and a stated interest in the undertaking. The sale of Rome to Okonite eliminated the possibility that Okonite would have re-entered that market through internal growth, thereby creating an additional competitor in this highly concentrated field. The sale of Rome to Okonite, which thus substituted the merger of an actual and a potential competitor for the merger of two actual competitors, therefore was not an adequate attempt to restore competitive conditions as they would have existed but for the illegal merger of Alcoa and Rome.

b. The district court also failed to recognize the significant actual and potential competition between Rome and Okonite in other segments of the wire and

cable industry." At the hearing on divestiture, the government showed that Rome and Okonite were substantial producers of wire and cable, ranking eighth and ninth in this field; that both produced relatively broad lines of products; that both were known for their technological abilities; and that both in the past had expanded their lines to include new products. The Census figures for "nonferrous wire drawing" indicated that in the broad field of insulated wire and cable the combined Rome-Okonite share of sales (which totaled $2 billion for the industry) was 4.1 percent in 1964. In the subcategory of power wire and cable Rome had 2.5 percent; combined with Okonite's 12.6 percent, this amounted to 15.1 percent of total shipments. In portable power cable under 601 volts the combination of Rome's 3.9 percent with Okonite's 7.8 percent resulted in a total of 11.7 percent in 1963. In thermoplastic power cable over 601 volts, Rome had 6.9 percent and Okonite 3.3 percent for a combined share of 10.2 percent (GX 800).

Despite this significant overlap, the district court found that the statistical data reflected only "conceded facts which are of de minimis proportion"

[11] While the finding of violation of Section 7 in this case involved only the aluminum sub-market of the wire and cable industry, the other segments of the industry are closely related to that market. The evidence which we have cited in part (a), *supra*, demonstrates that for some applications copper and aluminum may be competitive, and hence that the competitive structure of one market may affect the behavior of companies in the other. In addition, the *Kennecott* case, *supra*, did involve the lessening of competition in other segments of the wire and cable industry, and the proposed combination of Rome and Okonite would therefore weaken the relief obtained in that case.

(App. A, *infra*, p. 7a). In doing so, it accepted the market analysis offered by Alcoa which fragmented the various product markets into even smaller lines of commerce in which the overlap would be less substantial." The record demonstrates, however, that the Census data are, if anything, too specific rather than too broad. Okonite officials admitted that Okonite considers Rome to be a competitor (Viggiano Deposition, p. 25); that "anyone who manufactures wire cable is a competitor, whether they are [*i.e.*, whether we consider them to be] in any of our product lines or not" (Oler Deposition, p. 174; see Viggiano Deposition, p. 27); and that there is competitive overlap between some of the different Census categories (Oler Deposition, pp. 200–04). Indeed, Alcoa documents introduced

[12] It is significant that the documents considered internally by LTV in deciding to acquire Rome used statistical data prepared by the National Electrical Manufacturers Association ("NEMA") rather than Census data; the NEMA figures reflect broader markets that more closely approximate the actual competitive overlap between the products involved, and were recognized by LTV to be in this sense "the most inclusive available" (GX 801(B); see Tr. 390–393). For example, the NEMA figures show that in the broader competitive category of rubber and plastic power and control cable, Okonite had 11.9 percent and Rome 6.2 percent for a combined total of 18.1 percent of total sales by NEMA members in 1965 of $227 million. In portable molded cords and cables, Okonite had 15.9 percent and Rome 3.3 percent for a combined total of 19.2 percent; NEMA sales in this category were $22.6 million (GX 801(B)). That the Census figures understate the extent of actual competitive conditions is further demonstrated by LTV's internal memorandum stating that in its view, "high voltage paper [insulated cable, an area in which Okonite is probably the overall leader and in which Rome does not participate] is also fundamentally competitive with high voltage rubber and plastic," the latter of which Rome produces in substantial amounts (*ibid.*).

in the trial on the merits indicated that when Alcoa was considering purchasing a company in the insulated wire and cable business it first attempted unsuccessfully to purchase Rome, and then contemplated acquiring Okonite; it abandoned the latter idea only when Okonite was acquired by Kennecott (GX 167-169, R. 2192-2195).

In addition to the significant actual competitive overlap, the record demonstrates that under the appropriate standards enunciated by this Court, Rome and Okonite are significant potential competitors. An Okonite official stated that "we generally classify anyone making wire and cable a competitor of Okonite. If not now, certainly a potential competitor" (Viggiano Deposition, p. 27). The same official recognized that, with some specialized exceptions, the facilities for producing various types of wire and cable are interchangeable (*id.* at 65, 66), and that the process of deciding which type actually to produce is basically an "elect[ion] based upon the corporate strategy and the type of markets that we are servicing * * *" (*id.* at 36).

The district court, however, rejected this evidence of potential entry because it relied, as it had done in evaluating Okonite's potential entry into aluminum wire and cable, on disclaimers of managerial intent. The court stated that "the business policy of a corporation rests primarily upon its officers and directors who are held accountable in the matter of their business judgments," and, as we have noted, *supra*, that "there is no evidence that in the foreseeable future either Rome or Okonite plans to or is capable of

entering a product field other than it now occupies" (App. A, *infra*, p. 10a). This was an improper standard for assessing potential competition;[18] this Court has recognized that even in the more exacting context of finding a Section 7 violation, the critical factor is an objective market analysis, not management's stated intentions and predictions. *United States* v. *Penn-Olin Chemical Co., supra;* see *Federal Trade Commission* v. *Procter & Gamble Co., supra.* The district court's standard was particularly inappropriate in the wire and cable industry and for the particular companies involved. As early as 1957 the president of the then independent Rome stated that "39 percent of the products which we sold this year we were not making at the end of World War II" (R. 1753); and Alcoa's own witness at the hearing on the proposed sale of Rome to Okonite characterized LTV as a "high growth" company that "had made a smash success of Okonite in the first nine months" (Tr. 58–59).

Thus, there is not only significant potential competition between Rome and Okonite in aluminum wire and cable, but significant actual and potential competition in copper wire and cable as well. In approving the sale the district court thus sanctioned a merger with significant additional anticompetitive consequences of its own.

---

[18] We refer to the court's reliance on the firm's "plans." As to production capabilities, we have shown that the industry is characterized by considerable flexibility in production facilities, and that both Rome and Okonite have the capacity to enter into additional areas of the wire and cable business.

2. The district court further erred in failing to recognize the need to consider whether there were any alternative methods of divestiture that, although equally effective to undo the merger, would avoid the anticompetitive consequences which the Rome-Okonite transaction entails. The original decree of divestiture provided for sale to an "eligible purchaser," which was defined as someone whom the court would approve (App. B, *infra*, p. 29a). During oral argument on the proposed sale, the court stated that it was not appropriate to speak of degrees of eligibility (Tr. 493). In other words, it was the court's view that in determining whether the competitive problems which might result from a particular sale warrant its rejection, it is immaterial whether a sale to some other purchaser would pose lesser or no such problems.

The considerations governing the formulation of relief in Section 7 cases (see *supra*, pp. 8-11), however, preclude such a narrow approach. For the aim of divestiture is to restore, as effectively as possible, the competitive situation in the industry as it would have been had the merger not taken place. To whatever extent there may be an alternative method of divestiture which reduces or eliminates additional competitive problems, its utilization would further that objective.[14] The court's failure to make such an inquiry was particularly serious here since, as we now show, two provisions in the decree of divestiture

[14] Compare the jurisdictional statement in *United States* v. *Third National Bank in Nashville*, No. 86, this Term, p. 23, probable jurisdiction noted June 12, 1967.

operated significantly to deter other prospective purchasers from acquiring Rome.

3. The district court's errors in approving the sale were compounded by two provisions in the judgment of divestiture—pursuant to which Alcoa negotiated the sale—which reduced the likelihood of obtaining the most appropriate relief by discouraging potential purchasers of Rome.

a. The judgment established an unreasonably high price for the Rome assets. The district court ordered Alcoa to negotiate for the sale of Rome at what it termed an "upset" price. Although the upset price provision did not in terms guaranty that Alcoa would suffer no loss upon divestiture, in operation this was its practical effect.[18]

We submit that providing such a price floor reflects an undue concern for the private interests of the company that made an illegal acquisition, and seriously restricts the alternatives available for divestiture either by spin-off or by sale to a non-competing firm. In the present case only three companies in addition to LTV expressed more than casual interest in acquiring Rome at the upset price; there is every reason to believe that others would have been willing to negotiate at a lower price.

The testimony of Alcoa's executive vice president whose duty was to sell Rome established that poten-

[18] An Alcoa official testified that Alcoa had purchased Rome for approximately thirty million dollars—or thirteen million dollars more than the book value at that time. The upset price reflected the entire "good will" or "going concern" value that Alcoa had paid, less depreciation (Tr. 156, 161).

tial purchasers were deterred by the high price. When asked if alternative purchasers were available, he conceded that "I could get talks going with lots of people I am sure, but there are an amazing number of people that want to pick up something for nothing. The first thing we would get would be thousands of hungry brokers getting into the act * * *" (Tr. 81). He indicated that Alcoa considered a price to be reasonable only if it covered the amount Alcoa had paid, less depreciation (Tr. 51–52, 80, 151). He admitted that Alcoa had not hired (Tr. 132) or even approached (Tr. 131) any broker. Similarly, Alcoa's explanation of why it had rejected other offers basically was that the price had not been sufficient. Although Alcoa argued that it could not have "marketed" the securities that it would have been required to accept as payment under those offers—and although the government might well have objected to Alcoa's retention of such security interests—the record shows that Alcoa's real concern was that it could not have sold the securities for a cash realization equivalent to the upset price (Tr. 62–69, 73–75).

The district court stressed in its first opinion on remand, establishing the terms of relief, that the purported similarity between the present case and *United States* v. *Kaiser Aluminum & Chemical Corp.*, Civil Action No. 2[illegible], D. R.I., April 28, 1961—a non-litigated Section 7 case settled by consent decree—"prompted this court to adopt the Kaiser judgment in all but one of its essential parts" (App. B, *infra*,

p. 26a).[16] But in *Kaiser* there was no judicial adjudication that the acquisition violated Section 7; and a consent judgment entered in such circumstances throws little, if any, light upon the scope of proper relief in a fully litigated case. *United States* v. *du Pont, supra,* p. 330, n. 12.

The court also stated that the upset price was designed to eliminate speculators from seeking to purchase Rome (App. B, *infra,* p. 24a). Protection against speculators, however, hardly required tying the divestiture price to the price which the acquiring company paid.[17] If the court believed that only a company with substantial financial and management resources (such as LTV) could have operated Rome as a going concern, with the attendant benefits to the Rome, New York, community that the district court envisioned, lowering the divestiture price might well have attracted one or more of such additional firms.

In sum, the upset price, although aiding Alcoa to come out whole from its illegal acquisition of Rome, diminished the availability of purchasers for Rome and thus made it less likely that a sale without the

[16] The difference to which the court alluded was that the *Kaiser* decree provided that if Kaiser could not find a purchaser (at an upset price) after nine months of bona fide effort, it would automatically be allowed to keep the facilities it had acquired; the court in the present case left that contingency for further determination (see part 8b, *infra*).

[17] Such protection could more easily—and certainly more directly—have been afforded by a provision requiring any purchaser of Alcoa to assure the court that it intended to operate the Rome facilities as a going concern; such provisions are common in antitrust judgments.

anticompetitive effects of the Okonite merger could be made. "[C]ourts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests" (*United States* v. *duPont & Co., supra,* at 326).

b. The judgment established a period of only six months in which Alcoa was to attempt to find a purchaser willing to pay the upset price. After that time, the court could require Alcoa to continue for another three months to try to sell Rome; but beyond that period the judgment held out the possibility of considerably lesser relief. Thus, it explicitly indicated that if Alcoa was unable to find such a purchaser within that time, Alcoa might be permitted to sell only part of the assets, or to leave part of the assets idle for five years, or, indeed, to keep and use all of the Rome assets without making further efforts at divestiture (App. B, *infra,* p. 31a-32a). In thus holding out to Alcoa the hope that it could keep Rome or at least avoid complete divestiture, the district court failed to perform properly its duty to fashion a judgment affording conditions—including incentives for prompt divestiture—that maximized the likelihood that full divestiture would occur under circumstances most likely to avoid additional anticompetitive problems.

## CONCLUSION

This appeal presents substantial issues affecting the adequacy of relief in antitrust litigation under Section 7 of the Clayton Act. Probable jurisdiction should be noted.

Respectfully submitted.

THURGOOD MARSHALL,
*Solicitor General.*

DONALD F. TURNER,
*Assistant Attorney General.*

ROBERT A. HAMMOND III,
HOWARD E. SHAPIRO,
RONALD B. LEWIS,
*Attorneys.*

JUNE 1967.